Approved 10/3/07

TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
September 5, 2007

Board Present: Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, Frank Muddle, Attorney Greg Cunningham, CEO Scott Bickford and Recording Secretary Deborah Sealey

Absent: None

1.Call to Order: Chairman Remian called the meeting to order at 6:03 P.M. and took a roll call.

2. Correspondence: The chairman said the Board had received two letters from James Katsiaficas, representing Robbins Mountain Subdivision abutter Bonnie Miller. One was in reference to the road and the other to the Garrett storm water study. The chairman had received an email from Ms. Miller, in which she repeated her attorney's points and included a photo she had sent to the DEP. Ms. Miller suggested the PB's deliberations follow the conditions included in the storm water technical review by Art McLaughlin.

3.Approve the Minutes of the 8/1/07 meeting: Mrs. Kalloch made the following corrections: 1) Pg. 1, Item 4, first sentence should read "Baker land", 2) Pg. 2, first paragraph, Line 7, should read "bought from Phillip Young". Mr. Ellis corrected the last line on Page 2 to read, "Chairman Remian said the Board had no process to do it...."

ACTION: Mrs. Kalloch made a motion, seconded by Mr. Cobey, to approve the minutes as corrected. Carried 5-0-0

4. Pre-Application for Proposed Subdivision, Map 4, Lot 71A (portion) and including Lot 71G, presented by Anthony Casella, Trustee of Lady Marion Trust: Mrs. Kalloch disclosed that Mr. Casella was her client for selling a lot on Ledge Lane, containing two trailers. She said she did not feel this constituted a conflict of interest, but would defer to the Board's opinion. She said there had been no discussion of her listing the rest of the subdivision. PB Attorney Cunningham stated that the litmus test was whether Mrs. Kalloch would gain monetarily by the decision made here, which her sale did not.

Drew Grenier said he had done the survey, drafted preliminary language and prepared the packet for this subdivision application. There were 7 lots around the soil test sites, he said. Mr. Remian said that Lot 4 (9/10-acre) did not meet lot size requirements. Mr. Grenier and Mr. Ellis said the net developable area on Lot 4 was 41,000 Sq. Ft. and the chairman asked that the surveyor note lots sizes in square feet.

Mr. Cobey asked about other divisions in the past five years. Mr. Grenier said that Mr. Casella had reserved Lot 71A when he bought the property from Day. Mr. Casella stated that he had bought Lots 1 & 2, contiguous with the land bought from Day, from Vicki Young's brother. Mr. Ellis requested a narrative on the history of the property included in the subdivision application. Mr. Casella responded that all of the property had been sold five years before he bought any of it. Mr. Remian said the Young property was a separate parcel and asked how Mr. Casella could say there was no infrastructure cost when there was 1000' of road proposed. Mr. Casella responded that he owned a construction company, so there would be no cost to him.

Mr. Cobey asked why Lot 4 could not be accessed from the road and was told there was a sight line problem. Mrs. Kalloch ascertained that the land behind Lot 7 contained a small stream surrounded by wetlands. Mrs. Kalloch asked about a fire pond and Mr. Casella said it had not been designed yet because he was not sure of the criteria or where it should be located. Mr. Ellis referred him to Section 7.9 in the Subdivision Regulations [SR]. Mr. Grenier asked if there were an existing fire pond within 200', or a hydrant nearby. CEO Bickford suggested the applicant meet with the fire chief. Mr. Grenier said there was not much opportunity for a fire pond in addition to room for the fire equipment to turn around. The Board discussed options with the surveyor and applicant.

Mr. Remian told the applicant to be sure every criterion of the new SR was addressed in the application or on the plan. Mr. Grenier asked if the town required an engineer to design the storm water management plan. Mr. Ellis said a report from a professional engineer was required if there was a an application for site location or storm water management from the DEP, which there was not in this case.

Mr. Ellis asked if the Board had the latitude to decide whether a site visit required the entire Board's presence or could be performed by the CEO. Mr. Grenier was told he would send the abutters' notices and provide their receipts to the Board. Mr.. Remian told the applicant that the CEO should be able to answer any questions and said the review would be conducted under the SR dated 5/19/07 because the application had been submitted 8/22/07. Mr. Cunningham asked when the Board expected to complete the revisions to the SR. Mr. Remian said he expected them to be completed the next day and implemented by the first week in October. Mr. Cunningham said that the new regulations might be in place before substantive review of this application began. Mr. Remian said he would keep the applicant informed on this point.

5. Continuation of Robbins Mountain Subdivision Application [RMS], Map 5, Lot 84: Mr. Remian had asked the PB's attorney to clarify one of the letters from Bonnie Miller's attorney. Mr. Cunningham stated that Mr. Katsiaficas asserted that Mr. Tower claimed that two lots on Maple Juice Cove were pre-existing non-conforming lots, both of which could be developed. CEO Bickford asked the applicant if he had agreed the two lots would be merged, due to square footage. Mr. Tower said he proposed combining the lots, though they were separate in the deed descriptions. Mr. Cunningham said Mr. Katsiaficas suggested that the applicant claimed the lots were non-conforming lots of record, so were legal even though they did not meet the dimensional requirements. Mr. Katsiaficas also claimed that the applicant had not shown that Pleasant Point Rd. was a road established prior to 9/22/1971. Therefore, until the applicant demonstrated that there was a private or public way separating the Maple Juice Cove lots from the remainder of the land, the lots in question were part of the other land; thus, the applicant proposed to create two non-conforming lots. Mr. Cunningham said Mr. Katsiaficas was asking that the applicant provide the Board with the history of Pleasant Point Rd. in order to meet the burden of proof that the two lots were previously non--conforming. Mr. Cunningham reported that when he had spoken with Mr. Katsiaficas, that attorney said this issue had been resolved because it had been related to the Board of Appeals proceeding, which was no longer an issue. Mr. Cunningham stated his opinion that this had been a technicality and an unreasonable request because providing the history of a road was an undue burden on an applicant. There was further discussion on this point.

The chairman confirmed that the applicant had requested that the Robbins Mountain Subdivision [RMS] be reviewed without the shoreland zone portion, referred to as "common land" in the most recent drawing. The Board agreed that they would go by this 8/1/07 drawing.

Mr. Remian said the Board had asked for additional information and had today received the view analysis for the visual impact study from the DEP's Becky Maddox. He said the PB members should have a copy of this analysis before proceeding on that aspect. Mr. Ellis said the viewscape study was related to the DEP permit. He said the aesthetics criteria had passed and asked if this was relevant to obtaining the DEP submittals approval. Mr. Remian responded that the Board had also asked how it related to storm water and Ms. Maddox could not say when that would be decided. Mr. Ellis said the PB had also asked for the fire chief's approval for the review process, which Chief Kiskila had provided on 8/3/07.

Mr. Tower said the visual impact assessment had been prepared at the DEP's request and the assumption was made that the entire site, including Randy Robbins' property, would be clear-cut. He acknowledged that the PB had expressed concern about how it would look after cutting was completed. He stated that, even with those assumptions, the conclusions of the visual impact study read, "The proposed development is observed only from close range. The existing trees surrounding the site, together with the added buffer of vegetation retained within the property, provide substantial visual buffering of the development from all available viewpoints. It visually and culturally fits within the shoreline context." Mr. Cobey asked who prepared the study and for whom. Mr. Tower said Pepperchrome, which had software that allowed insertion of visual objects, prepared it. The study, he said, contained before and after photographs from all viewpoints. Mr. Tower acknowledged that it had been prepared at great expense to him. Mr. Cobey asked the applicant to provide a copy of the study to each Board member and received confirmation from the chairman that the DEP had this study.

Mr. Remian asked why the Board had not received the court case information on aesthetics and Mr. Tower said it had slipped his mind. Mr. Cobey said certain items in the standards (9.3, 9.6 and 9.12), tabled at the 7/18/07 meeting, likely had no bearing now. Mr. Ellis, at Mr. Remian's request, read aloud Section 9.3 (Open space provisions).

ACTION: Mr. Remian made a motion, seconded by Mr. Ellis, that since the open space had been removed from the subdivision plan, it did not apply to this subdivision application.
Carried 5-0-0

Mr. Remian said the Board was awaiting the DEP's response to its inquiries before considering Section 9.6. He noted the members had received a letter and diagram from Fire Chief Kiskila approving the fire pond plan on 8/18/07.

ACTION: Mr. Ellis made a motion, seconded by Mrs. Kalloch, that, based on submittals and approval of the fire chief, the fire pond plan is adequate.
Carried 5-0-0

Mr. Cobey said there had been discussion of what would be noted as common area and/or retained land and said Mr. Tower currently said the property containing the road would be noted as retained land. Mr. Cobey thought the remaining 14.5 acres of the subdivided property was also retained land. It was his understanding that the granting of these lands to anyone could not be seen as having been forced by approval of the subdivision. Mr. Cobey requested a definition of "retained land". He assumed that this was something the Board should accept as standard practice, but he had originally been concerned that the road system would be maintained by the residents, and eventually owned by them. Mr. Cunningham asked if he were talking about the access road into the subdivision, saying that he thought there were covenants pertaining to it. Mr. Cobey said the covenants required maintenance by the Homeowners' Association [HOA], but had lacked indication of ownership. Mr. Cunningham stated that the term "retained land" referred to land adjacent to a subdivision that was excluded from the subdivision review process. He said the access road to the RMS did not meet that definition and he would be very concerned about the ability of title abstractors or PB viewing this plan in the future (showing this road as retained by the developer), because it might suggest the road was not subject to subdivision standards or was deemed not to be a part of the subdivision, which it clearly was. He said there was a legal and practical concern over using the "retained land" label on it. In addition, Mr. Cunningham said it was a practical concern for the applicant to the extent that if that land were ever conveyed to the HOA or someone else the applicant would come back to the Board and the plan.

CEO Bickford asked if this would not also present a problem with frontage. Mr. Cunningham said that frontage had to be on a public or private way, which this road would be if the developer maintained ownership. He said he did not understand the justification for keeping the road as retained land. Mr. Cobey stated that the applicant wanted to be able to give the road to the HOA and benefit from the gift. Mr. Cunningham said any buyer of a lot in the subdivision had the right to use the road. Mr. Tower said that his definition of "retained land" was "portions of a parcel of land not offered for sale to the public." He stated that this road had never been offered for sale to the public and he had never been asked to define the roads in his other subdivisions as anything but a ROW, which he had done in this case. Mr. Cobey asked the developer if he could isolate the fire pond from the retained land, calling it a common area, and Mr. Tower said that should be done. The applicant said he preferred to keep any land he might consider gifting from anyone's (PB, DEP, etc.) consideration, due to IRS regulations.

Mr. Ellis noted that the covenants designated the common area shall be owned and maintained by the HOA. He was concerned about what had happened on other subdivision roads where the covenants did not say how road ownership would be transferred to the HOA. Mr. Remian ascertained that the covenants included in the 6/6/06 application were those of record. Mr. Ellis said that the covenant's handling of ownership of common areas, fire ponds and roads remained a concern because he did not wish to see another situation like that on Racoon Road. Mr. Cunningham said that, even if the covenants were not put in place, there was a statutory ability for owners of lots to create their own road association. He continued that the road did not come under "retained land" and the right of a lot owner to access his land from the road ran with the deed. Mr. Tower stated that he intended to transfer the common areas to the HOA at the earliest possible time; his final plan would include "ownership" in Note 4.

ACTION: Mr. Cobey made a motion, seconded by Mrs. Kalloch, to table until we get the rest of the information requested.
Carried 5-0-0
[This motion was voted subsequent to the next one. The chairman called the vote on this motion by asking "all those in favor of the motion as amended to signify by saying Aye."]

Mr. Tower confirmed that the Board was waiting on the storm water management plan and the DEP, which might take a while due to the workload and open positions there. Consequently, he asked the Board to consider a final approval with the conditions that the DEP give final approval and that the storm water question be satisfied. Mr. Cobey said he wanted to wait until the Board received an answer from the DEP's Becky Maddox. Mr. Remian said the question of financial capacity had been passed over in lieu of Section 11.1 (Performance guarantees), which had been approved at the 6/20/07 meeting. Mr. Remian stated that the Board had required the applicant to comply with Section 11.1 and approved Section 7.10 (Financial and technical capacity) without conditions.

Mr. Muddle asked what would happen if the Board granted conditional final approval and the subsequent documentation did not meet the standards. Mr. Cunningham said if state standards were more stringent than the town's, the Board could approve the subdivision tonight with the condition that approval was not valid until DEP approval was received. If there were information within the DEP filing that related to something specific in the SR standards, the Board should withhold approval, the attorney said. The chairman explained that the Board had gone to the DEP with some questions related to the SR criteria. Mr. Ellis clarified that the Board was waiting for both the DEP's approval and response to the specific questions posed. Mr. Muddle asked if the DEP approval letter would meet the Board's needs and Mr. Remian said he didn't know.

Mr. Tower said that Mr. Cunningham was correct in asking if the town had more stringent storm water criteria than the state; he said the state's were far more comprehensive and stringent. He said he had been baffled by what the Board expected from the DEP. Mr. Cobey responded that he wanted an answer on disturbed area and Mr. Remian wanted information on plumes. Mr. Remian said there had been so many errors in the applicant's submissions to the DEP that he wanted to wait for its response. Mr. Muddle asked if the state was more stringent, why did that not meet the SR criteria. He added that he felt it was unfair to be held up by a shortfall at the DEP after all the time and energy expended by the PB. Mr. Remian disagreed, saying there were questions posed by the public that must be answered. He said Mr. Tower had refused the Board's request to pay for an independent review.

Mr. Tower stated that the PB's application review was in a time-controlled period, which allowed the PB to table the application only with his consent; he had provided everything except the DEP approval and asked the Board to vote on the application. Mr. Remian asked what benefit conditional approval would bestow on the applicant. Mr. Tower responded that it would save him from having to attend more meetings. He said issues had been discussed repetitiously, with no new information coming to light and he felt there was no need for additional information. The Board and applicant discussed the contents of and contentions in Mr. Katsiaficas letter.

Mr. Muddle asked if Mr. Tower would agree to table if the Board agreed to call a meeting immediately after receiving the DEP approval. Mr. Ellis clarified that the Board was waiting for both a letter from the DEP and the DEP storm water approval.

ACTION: Mr. Muddle made a motion, seconded by Mr. Cobey, to amend the motion that once the DEP letter and board order granting site location of development act approval for the Robbins Mountain Subdivision is received to call a meeting of the Board at the earliest possible date to review the letter and application. Carried 5-0-0

6. Application for Building or Use Permit in Shoreland Zone, Map 4, Lots 85 & 86 (previously part of Robbins Mountain Subdivision), presented by James Tower: Mr. Ellis noted that this application, submitted on 8/1/07, would be reviewed under the "new" Shoreland Zoning Ordinance [SZO], dated 2/22/07. He said the first section of the SZO that applied here was Section 12, which spoke to non-conformance. Mr. Ellis read aloud Section 12(A): "Purpose: It is the intent of this ordinance to promote land use conformities, except that non-conforming conditions that existed before the effective date of this ordinance or amendments shall be allowed to continue, subject to requirements set forth in this section." From this he moved to Section 12(E), concerning non-conforming lots. Mr. Cobey asked about change of use but Mr. Ellis said this lot had been vacant.

Mr. Cunningham asked if there was evidence in the record of the dates on which the lots were created. Mr. Ellis said there was not; although the Board had copies of deeds with six parcel descriptions, he was unsure which matched these two parcels. Mr. Cunningham said the burden of proving legal non-conformity was upon the applicant and the deeds should be included. Mr. Tower said the deed descriptions that read "Beginning on the easterly side of the road to Pleasant Point..." and "Beginning on the easterly side of the main highway leading from Broad Cove to Pleasant Point..." described Lots 85 & 86; the lots had been conveyed in 1948 and 1956. The developer said he would be happy to provide photocopies of the relevant deeds to accompany the application.

Mr. Remian quoted the application as referring to filling of "over 10 cubic yards" and he asked for an exact amount. Mr. Tower said he did not know. CEO Bickford asked if this required a tier permit from the DEP and Mr. Tower said that the entire subdivision did not trip the 1/10th-acre exemption for filing a permit with the DEP. The Army Corps, he said, had given its approval. Mr. Cunningham asked if the wetlands were of special significance. Mr. Tower said they were not, as they were fresh water wetlands that happened to be adjacent to the shore. Mr. Cobey said he would like to see on the plan how much area would be disturbed or filled. Mr. Tower said he had DEP approval on this.

In response to a question from Mr. Cunningham concerning an alternate parking area, Mr. Tower said that a previous application had shown exactly that. However, abutter Mr. Harlow had protested and the developer had agreed to move the parking area. Even though the new location resulted in more wetland impact, Mr. Tower said, both the DEP and the Army Corps had agreed that it was a just balance. There was discussion about what were acceptable uses on the lot. Mr. Tower read from the SZO that structures occupying a maximum of 20% of the lot, piers, docks and wharves, septic waste disposal systems, individual private campsites, mineral extraction and agriculture would be permitted.

Mr. Tower told Mr. Cobey that the pathway and parking areas would be crushed granite, the gate would be wooden with metal hinges, the ramp would be aluminum and the float would be wood with plastic tanks underneath. Mr. Remian said he would like to see a better delineation of the wetlands because he felt, based on the site walk, that not all were shown. Mr. Tower said he would add a copy of the expert's wetland report to the application. Mrs. Kalloch asked about the cutting of vegetation for the driveway and parking area and Mr. Cunningham said clearing was allowed for permitted uses. Mr. Cobey felt the proposed vegetation removal was excessive because the lot adjoined a significant wildlife habitat. He said the map of Cushing's significant wildlife habitat showed two types adjacent: 75' (tidal waterfowl habitat) and 250' (shorebird habitat). Mr. Cunningham said the 250' rule had been amended and activity within the buffers could be allowed with a permit. Mr. Tower said, now that this lot had been cut from the subdivision, he could not tell where this fit in the current permitting process and it might be necessary to file a separate NRPA permit.

Mr. Remian said he would also like to see dimensions. The chairman asked Mr. Cunningham if previously filled wetlands should be considered in the amount of fill the Board allowed now. The PB attorney said any fill placed there without a permit by a previous owner would be an enforcement issue and not an issue for the Board; it would be inappropriate for the Board to apply the criteria today to past filling.

The PB considered extending the meeting or postponing the application. Mr. Tower said the Board was under time constraints because the ordinance required a decision to be made within 35 days. Mr. Cobey asked if the application had been deemed complete and the Board agreed it had not, so the 35 days did not kick in. The Board agreed that the application needed the relevant deeds, amount of disturbance and there was a question of a DEP tier permit

ACTION: Mrs. Kalloch made a motion, seconded by Mr. Cobey, to postpone until next month.
Carried 5-0-0

7. Adjournment:

ACTION: Mr. Muddle made a motion, seconded by Mr. Cobey, to adjourn at approximately 9:20 P.M.
Carried 5-0-0

.
Respectfully submitted,

Deborah E. Sealey
Recording Secretary